United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

5-2-3

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,930

ODOM S. O'SHIELDS,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

917

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BEN GREENSPOON

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(Appointed by the Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether the lower court committed reversible error in not conducting a hearing on appellant's Motion For Correction of Sentence to determine if prior convictions in State courts, where appellant did not have assistance of counsel, would be material or pertinent to the amount of sentence received by appellant for a conviction in the District of Columbia.

2. Whether the lower court committed reversible error in not appointing counsel to assist appellant in the presentation of his Motion for Correction of Sentence.

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No. 18,930

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APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 1291, Title 28 of the United States Code and Section 2255, Title 28 of the United States Code. This is an appeal from the denial of a Motion for Correction of Sentence treated as a motion filed pursuant to 28 U.S.C. 2255. This appeal was filed on July 2, 1964.

STATEMENT OF THE CASE

Odom S. O'Shields, appellant herein, was convicted on January 13, 1957, of housebreaking and robbery in the United States District Court for the District of Columbia. On March 22, 1957, appellant was sentenced to imprisonment for a period of from five (5) to fifteen (15) years, and he has since been denied parole.

On April 15, 1964, appellant, while in confinement at Lorton, Virginia, mailed to the United States District Court a paper entitled "Motion For Correction of Sentence in Criminal Case No. 1024-56 Pursuant to Section 2255 U. S. Code." In his motion, petitioner urged that, under the authority of a United States Court of Appeals (2d Circuit) (petitioner was referring to Durocher v. LaVallee, 330 F.2d 303 but did not have the name or citation at that time), if he (or any second offender) could establish that his first conviction or plea of guilty was illegal, then the offender could petition for a resentencing on his second conviction.

Petitioner also added a prayer requesting the District Court to (1) grant a full hearing on the motion and (2) appoint counsel for him in order that he might establish that the prior or underlying convictions were obtained illegally. The District Court, Judge Youngdahl, allowed the pleading to be filed as a Motion pursuant to 28 U.S.C.2255 without prepayment of costs on June 29, 1964.

On June 30, 1964, appellant filed an "Affidavit In Support of Application for Leave to Proceed Without Prepayment of Costs" and simultaneously therewith, a "Memorandum In Support of Motion for Correction of Sentence in Criminal Case No. 1024-56". In his Memorandum, appellant pointed out the doctrine enunciated in the Gideon v. Wainwright case. He further referred to the decision rendered by the Second Circuit which he again was unable to identify although he had made a diligent search. (Again, appellant meant Durocher v. LaVallee, supra.)

Copies of two letters accompanied the Memorandum: the first to the Clerk of Court, Guilford County, North Carolina, and the second to the Clerk of Court, Spartanburg, South Carolina. In both letters appellant requested copies of court records which the two courts might have to attempt to establish his absence of counsel in cases tried years ago.

The Clerk of the Court in North Carolina responded and a copy of that court's certification was filed in the District Court. Appellant apparently received no answer from the Spartanburg, S. C. court for there is no certificate from that court in the record. 1 /

1 / Court-appointed counsel obtained certified copies of the court records from Spartanburg, S. C. Although those records are not before this court, counsel believes they might be of some help in a hearing on the Motion for resentencing.

Appellant, on June 10, 1964, filed an additional pleading in the District Court entitled "Motion For Judgment Under Rule 54 et seq., and 55 et seq., Rules of Civil Proc., 28 U.S.C." He prayed for a summary judgment upon his previous motion for correction of sentence.

The trial judge, in a brief notation made on the body of appellant's motion for correction of sentence, denied the motion. The trial judge also denied the motion for judgment under Rule 54 et seq. and 55 etc.

On July 2, 1964, appellant filed a Notice of Appeal in the District Court. Judge Youngdahl wrote: "The appeal is frivolous, raises no substantial issue of law, and is not taken in good faith. Appeal denied." The denial was ordered on July 15, 1964.

By order of September 21, 1964, this Court granted appellant's petition for leave to prosecute an appeal without prepayment of costs, Circuit Judge Burger voting to deny appellant's petition.

STATUTES INVOLVED

Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one half longer than the maximum fine and imprisonment for the first offense. Title 22, Sec. 104, D. C. Code, (1961 Ed.)

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. Title 22, Sec. 104 D. C. Code, (1961 Ed.)

STATEMENT OF POINTS

1. It was error for the District Court to deny a hearing to appellant on his motion for correction of sentence.

2. It was error for the District Court to not appoint counsel to assist appellant in presenting his motion for correction of sentence.

SUMMARY OF ARGUMENT

Under the mandate of Gideon v. Wainwright, the District Court should have conducted a hearing to determine if the prior convictions of appellant in several State courts were in fact obtained without benefit of counsel. Instead, the court denied the motion filed pursuant to Section 2255 by fiat and did not afford appellant the opportunity to show previous illegal convictions. Once having had such a hearing, the District Court would then have all available information about appellant as an aid in considering sentence.

Where a motion is filed alleging improper prior convictions, which convictions may influence the sentencing judge, counsel should be appointed to assist the appellant in presenting his evidence.

ARGUMENT

I

A Full Hearing Should Have Been Held in the District Court

The question answered by the Supreme Court in its ruling in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963) has opened the door to a multitude of new questions. In reconsidering the holding in Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, the guarantee of counsel where requested in serious criminal offenses, is a fundamental right made obligatory upon the States by the 14th Amendment. There has followed many decisions and many more complex problems, among them the problem created by the instant case.

Title 22, Section 104, D. C. Code (1961 Ed) provides:

> Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding 50% greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense. (Mar. 3, 1901, 31 Stat. 1337, Ch. 854, Sec. 907)

Title 22, Section 2901, D. C. Code (1961 Ed.), provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching; or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof, shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, Ch. 854, Sec. 810)

At the outset, then, it is clear that Judge Youngdahl did not sentence appellant under the authority of Section 104. Indeed, the sentence (from 5 years to 15 years) was a valid sentence under the statute above quoted. This court, in Jones v. United States, 327 F.2d 867, sitting en banc, said:

> It is clear beyond peradventure that this court had and has no control over a sentence which comports with the applicable statute, "even though it be a death sentence." Nor may we reduce or modify a sentence nor require a trial judge to do so. (cases cited)

Thus, the case at bar does not fall into the category of cases where the offender received a harsher sentence by virtue of a statute subjecting the second or third offender to a greater punishment merely because of the previous and underlying conviction. This case presents, then, this proposition: can this, or any appeals court, look beyond the valid sentence given to a second or third offender for his second or third offense where that offender has been convicted or plead guilty in a state court without benefit of counsel and, in fact, the offender

was not sentenced under a second offender statute? And, if this court answers that question affirmatively, can or should this court apply the principles of Gideon v. Wainwright retroactively?

One of the first major decisions to apply the Gideon doctrine was referred to by this appellant in his own petitions and memoranda filed in this court and the District Court - Durocher v. LaVallee, 330 F.2d 303 (2d Cir. 1964) cert. denied 377 U.S. 998. The cases of four second offenders were consolidated at that time. In considering the four cases, the Second Circuit decided these important issues (1) the requirement of court-appointed counsel is not limited to cases of "not guilty pleas" as was the case in Gideon. (2) The Gideon doctrine should be applied retrospectively and (3) the District Court must determine the factual pattersn, e.g., was the defendant advised of his right to counsel, did he waive that right effectively and if he did not waive the right, and was indigent, was he afforded court appointed counsel.

It must be noted, however, that each offender in Durocher v. La Vallee was in fact sentenced under the New York second offenders statute. The court pointed out by footnote, though, that "while the sentences which Durocher received as a second offender did not exceed the maximum possible sentences for a first offender, this should in no way affect our result . . . It is possible, therefore, that

upon resentencing Durocher would receive a sentence shorter than the period which he has already served."

In ruling on appellant's several motions, Judge Youngdahl wrote that neither the Gideon case nor the Durocher case "would bar the sentencing court from considering, as an aid to sentencing when said sentence is completely discretionary with the court, a complete one sentence report containing prior convictions allegedly secured from defendant on occasions when he did not have the assistance of counsel." The court went on to say that he would have given the same sentence without considering the list of petitioner's prior convictions.

Again, it is clear that the trial court has in its discretion the right to consider all information it can find to help in imposing sentence. Jones v. United States, 113 U.S.App.D.C., 233, 307 F.2d 190. See also Williams v. New York, 337 U.S.241, 244, 69 S.Ct. 1079, 93 L.Ed.1337 (1949).

Nevertheless, in ruling on the appellant's motions, the trial court did not afford the appellant a hearing. At a hearing with counsel, to help, appellant would have had the opportunity to establish the illegality of his prior convictions. Whether this would have altered or changed

the court's sentence is, at this time, speculative. But, one thing is clear: appellant would have had the opportunity to present more information than was then available to the judge in the presentence report.

II

The District Court Should Have
Appointed Counsel to Assist
Appellant in Presenting his Motion

It is interesting to note that appellant requested that counsel be appointed to represent him in his hearing on the motions. This becomes critical when, after a search of the record in this case, there appears letters to two state courts requesting information concerning prior convictions but only one certificate is filed. It is apparent, then, that appellant needed counsel to guide and assist him.

In the wave of cases brought to the federal courts since the Gideon decision, a great number have been remanded for hearings on the issue of lack of counsel in state courts. See United States v. Wilkins, 315 F.2d 865 (2d Cir.1963). Again, it is conceded that in all cases, the petitioners were sentenced under a second offender's statute.

A recent case from the 7th Circuit, however, is helpful to this case. In Campbell v. United States, 318 F.2d 874 (7th Cir.1963) the petitioner had filed a motion to vacate sentence and judgment of

conviction. It was denied without hearing. The appellant filed a second or successive motion under 28 U.S.C.2255 and an appeal followed. The Court of Appeals affirmed the lower court's decision. Subsequently, the Gideon case was decided. At this point the Court of Appeals, while conceding that the appointment of counsel in that circuit was discretionary, stated:

> In the light of the Gideon case, it is our opinion, that since no good reason appears why petitioner should not have had the aid of counsel in presenting the first motion, that the order at bar should be reversed.

Thus, the court ruled that the Gideon case compelled the assistance of counsel to the petitioner in the presentment of his motion under Section 2255. It is submitted that this should be the procedure in this case. Since the law of the land requires the assistance of counsel in serious criminal offenses and since the issue has been raised as to the characteristics of the man sentenced, it is of the utmost importance that the court, in determining sentence, fully establish the circumstances of prior convictions. In fact, upon a retrial, Gideon who had conducted his own defense, in his first trial in Florida, with the assistance of counsel, was acquitted.

The retroactivity of the Gideon doctrine has been applied. See Palumbo v. State of New Jersey, 334 F.2d 524. Also, on June 22, 1964, the petition for certiorari of La Vallee in the Durocher case, supra, was denied by the Supreme Court, 377 U.S.998. Mr. Justice

Harlan, dissenting from the denial of certiorari to the United States Court of Appeals for the Second Circuit, stated:

> The issue is whether this court's holding in Gideon v. Wainwright, 372 U.S. 335, is required to be given retroactive effect. That question; which is of continuing concern in the administration of criminal justice in a substantial number of cases, deserves plenary consideration by this court, which it has not yet had.

It is urged that there is no logical or legal bar to the doctrine of Gideon v. Wainwright being applied in this case. See "The Right to a Lawyer" 39 Notre Dame L. 150 (1964)

CONCLUSION

It is submitted that this appellant be afforded an opportunity, with the assistance of counsel, to present to the District Court evidence that he did not have assistance of counsel in prior state court convictions, as an aid to the court in determining whether or not sentence imposed should not be reduced.

Respectfully submitted,

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(Appointed by the Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18930

ODOM S. O'SHIELDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
BARRY I. FREDERICKS,
Assistant United States Attorneys.

QUESTION PRESENTED

Did the District Court properly deny, without hearing, appellant's 28 U.S.C. § 2255 motion seeking to attack the validity of a prior state conviction and reconsideration of his District of Columbia sentence?

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*Cases chiefly relied upon are marked by asterisks.

OTHER REFERENCES

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No. 18930

ODOM S. O'SHIELDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on October 8, 1956, in a two-count indictment charging him with violation of 22 D.C. Code §§ 1801 and 2901 (housebreaking and robbery).[1] On January 17, 1957, a jury found appellant guilty as charged (Cr. No. 1024–56). Appellant filed a motion for a new trial, which was heard and denied on March 22, 1957. By judgment and commitment filed March 22, 1957, appellant was sentenced to serve five to fifteen years' imprisonment on each count of the indictment, sentences to run concurrently.

On April 1, 1957, the trial court allowed appellant to prosecute an appeal *in forma pauperis*. On February 27, 1958, this Court affirmed the judgment of the trial court. *O'Shields* v. *United States*, 103 U.S. App. D.C. 70, 254 F. 2d 773 (1958).

On July 23, 1958, appellant filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. This motion was denied

[1] Appellant was indicted with two co-defendants, one Max N. Cecil and one Evelyn M. Cecil. On January 17, 1957, the jury found Max N. Cecil guilty as charged, and Evelyn M. Cecil not guilty.

on November 14, 1958. On January 16, 1959, appellant filed a second motion for a new trial, which was denied on March 16, 1959. On November 21, 1959, appellant filed a third motion for a new trial, which on November 25, 1959, was also denied.

On May 25, 1960, appellant filed a second § 2255 motion, which was denied on July 25, 1960. The trial court allowed leave to appeal *in forma pauperis* from the denial of this motion. This Court dismissed appellant's appeal on January 3, 1961 (No. 16,011).

On May 28, 1964, appellant filed a motion to correct sentence in which he requested that a hearing be held to determine the validity of his prior conviction in Spartanburg, South Carolina, and to reconsider the sentence imposed upon him in this jurisdiction in Criminal No. 1024–56. In denying appellant's motion Judge Youngdahl concluded that such a hearing would be fruitless and that in reconsidering the files, without consideration of appellant's criminal record, he would impose the same sentence. Therefore, finding that the files and records of the case conclusively showed that appellant was entitled to no relief, Judge Youngdahl denied appellant's motion without a hearing.

Appellant now seeks to reverse this ruling and require the court to hold a hearing on his motion.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 28, United States Code, Section 2255, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

SUMMARY OF ARGUMENT

Appellant's sentence was legally imposed, and therefore a motion under 28 U.S.C. § 2255 will not lie to require the trial court to reconsider the sentence it imposed. The validity or invalidity or the prior state conviction has no relevancy as to the legality of the sentence imposed by the District Court. Upon review of appellant's case, without consideration of the questioned state conviction, the trial judge concluded that he would impose the same sentence originally imposed. To require a hearing on appellant's motion to put in issue the unreviewable exercise of discretion by the trial court would be a useless gesture.

ARGUMENT

The court properly denied, without a hearing, appellant's 28 U.S.C. § 2255 motion for correction of sentence

A

Appellant, conceding that the sentence imposed upon him in Criminal No. 1024–56 is properly within the prescribed legal limits of the statutory provision under which he was incarcerated, now seeks to use 28 U.S.C. § 2255 as a means of securing appellate review of his prior state conviction, and thereby somehow having his present term of imprisonment reduced.

The sole purpose for the creation of a post-conviction remedy by way of 28 U.S.C. § 2255 is to afford a petitioner the same right he has under habeas corpus in a more convenient forum. *United States* v. *Hayman*, 342 U.S. 205 (1952), citing Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948). Therefore, as in habeas corpus, § 2255 is only available to challenge the legality of present confinement. *Jordan* v. *United States District Court*, 98 U.S. App. D.C. 160, 233 F. 2d 362, *vacated on other grounds sub nom. Jordan* v. *United States*, 352 U.S. 904 (1956); *Smith* v. *United States*, 88 U.S. App. D.C. 80, 187 F. 2d 192 (1950), *cert. denied*, 341 U.S. 927 (1951); *Taylor* v. *United States*, 299 F. 2d 826 (8th Cir. 1956), *cert. denied*, 351 U.S. 986; *Smith* v. *United States* 205 F. 2d 768 (10th Cir. 1953); *Crow* v. *United States*, 186 F. 2d 704 (9th Cir. 1950).

The District Court may deny without hearing any § 2255 motion when, considering the facts alleged to be true, the files and records conclusively show that the petitioner is entitled to no relief. 28 U.S.C. § 2255; *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 256 F. 2d 707 (1958), *cert. denied*, 358 U.S. 847; *Moore* v. *United States*, 101 U.S. App. D.C. 412, 249 F. 2d 504 (1951); *Cain* v. *United States*, 271 F. 2d 337 (8th Cir. 1959). Appellant's petition filed pursuant to 28 U.S.C. § 2255, which was in the nature of a motion to correct sentence, simply requested reconsideration of his sentence, alledging the illegality in his prior state conviction. This allegation, even assuming its veracity, would not have entitled him to any relief by way of § 2255, and therefore his motion was properly denied without a hearing.

B

A motion for relief under 28 U.S.C. § 2255 cannot be based upon errors or irregularities which might have occurred in a separate proceeding. This is especially true when the separate proceeding has no direct relationship with the prisoner's present confinement. *Bayden* v. *Webb*, 208 F. 2d 201 (9th Cir. 1953); *Bayden* v. *Smith*, 183 F. 2d 189 (9th Cir. 1950); *Doll* v. *United States*, 175 F. 2d 884 (10th Cir. 1949), *cert. denied*, 338 U.S. 874. Appellant concedes that Judge Youngdahl did not sentence him as a second offender (Br. 7). Therefore he can-

not say that there is any causal relationship between the sentence he received in Criminal No. 1024–56 and his prior state conviction. Thus, the validity or invalidity of his prior state conviction is not cognizable under § 2255,[2] and no hearing on appellant's motion would be required. *Edwards* v. *United States, supra; Moore* v. *United States, supra; Cain* v. *United States, supra.*

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[2] All the cases which appellant cites to advance his contention that the court should concern itself with the validity of his state conviction are cases which arise in the Second Circuit under a New York State statute [a] which provides for a mandatory increase in the sentence for a second offender over that imposed upon someone with no prior felony conviction. Under that statute once it has been alleged and proved that a defendant has a prior felony conviction the sentencing judge must impose the greater statutory sentence and may not consider whether increased punishment in the particular case is deserved by the offender or whether a lesser punishment would be more appropriate under the circumstances. *People ex rel. Prisament* v. *Brophy*, 287 N.Y. 132, 38 N.E. 2d 468 (1942), *cert. denied*, 317 U.S. 625 (1943). Therefore the Second Circuit held that on a writ of habeas corpus the New York Court must consider the validity of the defendant's first conviction in a sister state, because the New York State Legislature, by its mandatory second offender statute, has made the conviction of the sister state an integral part of its sentencing process. See *United States ex rel. Durocher* v. *LaVallee*, 330 F. 2d 303 (2d Cir. 1964), *cert. denied*, 377 U.S. 998 (Harlan, J., dissenting); *United States ex rel. LaNear* v. *LaVallee*, 306 F. 2d 417 (2d Cir. 1962); *United States ex rel. Savini* v. *Jackson*, 250 F. 2d 349 (2d Cir. 1957).

No such second offender statute exists in the District of Columbia, and therefore, neither the judgments nor the reasoning in the cases cited by appellant is applicable to the case at bar.

[a] NEW YORK PENAL LAW § 1941.

"Punishment for second or third offense of a person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the law of any other state, government, or county, of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon conviction of such second or third offenses as follows: If the second or third felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term; provided, however, that the minimum sentence imposed hereunder upon such second or third felony offender shall in no case be less than five years; except that where the maximum punishment for the second and third felony offender hereunder is five years or less, the minimum sentence must be not less than two years.

"For purposes of this section, conviction of two or more crimes charged in separate counts of one indictment or information, or in two or more indictments or informations consolidated for trial, shall be deemed to be only one conviction."

C

Appellant candidly concedes that the sentencing judge has the right to consider all relevant information in imposing sentence (Br. 9). Moreover, it is well established that the sentencing judge has broad discretion in the sources and type of evidence he will use to assist him in determining the nature and extent of punishment he will impose. *Williams* v. *New York*, 337 U.S. 241 (1949); *Jones* v. *United States*, 113 U.S. App. D.C. 233, 307 F. 2d 190 (1962); *Armpriester* v. *United States* 256 F. 2d 294 (4th Cir. 1958); *Parker* v. *United States*, 248 F. 2d 803 (4th Cir. 1957); *Humes* v. *United States*, 186 F. 2d 875 (10th Cir. 1951); *Kopp* v. *United States*, 55 F. 2d 879 (7th Cir. 1932). There can be no question that the sentencing judge may consider the prior criminal activities of the defendant before him, for such acts have a bearing on the defendant's character. *Husty* v. *United States*, 282 U.S. 694 (1931); *Roth* v. *United States*, 255 F. 2d 440 (2d Cir. 1958), *cert. denied*, 358 U.S. 819; *Parker* v. *United States, supra; Humes* v. *United States, supra; United States* v. *Durham*, 181 F. Supp. 503 (D.D.C. 1960). Since the sentencing judge is not bound by the rules of evidence applicable during the trial, the distinction between prior arrests and prior convictions, as they relate to the question of admissibility, is not applicable, and the judge is therefore not restricted so as to be able to consider only prior convictions while excluding prior arrests, especially when a prior conviction, as in the case at bar, might be vacated because of some procedural defect. *Roth* v. *United States, supra; Parker* v. *United States, supra.*

In the case at bar the sentencing judge, in his denial of appellant's motion for correction of sentence considered as a § 2255 motion, stated that he reviewed the records without reference to appellant's prior criminal convictions and concluded that he would not alter the original sentence imposed.[3]

[3] On June 29, 1964, Judge Youngdahl denied appellant's motion, making the following notation:

"In consideration of this motion and of the memorandum filed May 28, 1964; Neither *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), nor *Durocher* v. *LaVallee*, 330 F. 2d 303 (2d Cir. 1964), *cert. denied*, —— U.S. ——, 32 U.S. Law Week 3445 (June 22, 1964), would bar the sentencing court from considering, as an aid to sentencing when said sentence is completely discre-

Thus appellant cannot contend that his allegedly invalid South Carolina conviction has prejudiced his rights before this District Court.

Since the question of what sentence is to be imposed in a given case is completely within the discretion of the trial court and is not subject to appellate review, *Green* v. *United States*, 274 F. 2d 59 (2d Cir. 1960); *Bryson* v. *United States*, 265 F. 2d 9 (9th Cir. 1959), *cert. denied*, 355 U.S. 817; *Humes* v. *United States, supra*, no useful purpose would be served by requiring the trial court to hold a hearing pursuant to a 28 U.S.C. § 2255 motion to determine whether or not the court would exercise its discretion and reduce the sentence imposed.

CONCLUSION

Wherefore, it is respectfully submitted that the instant appeal be dismissed as improvidently granted, or in the alternative that the judgment of the District Court be affirmed.

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FRANK Q. NEBEKER,
BARRY I. FREDERICKS,
Assistant United States Attorneys.

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tionary with the court, a complete pre-sentence report containing prior convictions allegedly secured from defendant on occasions when he did not have the assistance of counsel. In any event, the Court has carefully restudied the pre-sentence report without considering the list of defendant's prior convictions, and the Court would impose the same sentence as originally imposed. The motion pursuant to § 2255 is therefore denied, since the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief."

U.S. GOVERNMENT PRINTING OFFICE: 1968